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ABSTRACT

A study was conducted to discover whether jurors perceived a difference between instructions to assign guilt on a "beyond a reasonable doubt" standard as compared with a "to a reasonable degree of certainty" standard. The main study included 88 communication students who read a case summary and one of four versions of jury instructions. They were then divided into six-person juries composed of people who had received identical versions of the jury instructions to deliberate the case. One group of jurors received burden-of-proof instructions emphasizing reasonable doubt, a second set emphasized reasonable certainty, a third set combined the two, and a fourth set had no instructions. After a verdict was reached or the jury was declared "hung," subjects were asked what their final vote in the deliberation had been and how strongly they believed in the defendant's guilt. It was found that the "reasonable doubt" instruction and the composite instruction produced almost identical results while the "reasonable certainty" instruction produced both belief-in-guilt ratings and a conviction rate lower than either of the first two. The no-instruction condition produced the highest mean rating of belief-in-guilt and the highest conviction rate. (TJ)

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PROOF BEYOND A REASONABLE DOUBT AS PROOF TO A REASONABLE DEGREE OF CERTAINTY

An Experimental Test of an Hypothesis Advanced by State Trial Judges

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by

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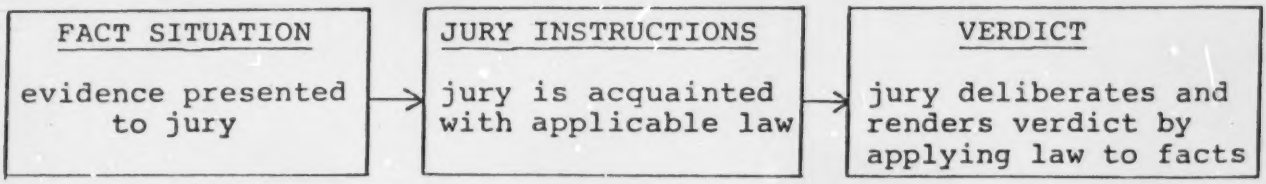
A citizen who survives the voir dire and is impanelled as a juror is thus recognized as a person of "ordinary reason and common sense." Such "ordinary reason and common sense" is presumed sufficient to enable the juror to reconstruct the fact situation being tried. It is then the juror's task to interpret the fact situation in light of the law applicable to such a situation. Competence in this latter task requires special instructions from the judge.

Most state trial judges are equipped with pattern jury instructions for instructing jurors in applicable law during criminal proceedings. In many states, these pattern instructions have recently undergone careful revision in order to make them more understandable to the typical juror. The wording of criminal jury instructions, taken from statutes, appellate opinions, law dictionaries, and even textbooks, is frequently replete with legal jargon and complex phraseology that impedes juror comprehension. Strawn's research (8) clearly indicates that the cause of justice in the trial courts is obstructed by limits on juror comprehension of what the law requires.

The wording of a jury instruction is guided by one over-riding principle: the instruction must "be the law." That is, the instruction must state precisely what the law requires, no more and no less. It must be completely unambiguous, and free of embellishments that would tend to confuse a juror as to exactly what the law requires in rendering a verdict about a given fact situation.

Diagramatically, the jury trial can be modelled as follows:


FACT SITUATION
evidence presented to jury
JURY INSTRUCTIONS
jury is acquainted with applicable law
VERDICT
jury deliberates and renders verdict by applying law to facts

When an existing instruction is revised for the purpose of increasing its comprehensibility, the revised instruction must "mean" the same thing as the original even though it "says" something different. This presumes that, at a substantive level, two or more messages can represent equivalent "meanings."

How can one determine whether or not two messages represent equivalent meanings at the substantive level? One procedure would be to have expert judges (individuals familiar with usage within a given linguistic/technical community) make a priori judgments of equivalency; in the case of jury instructions, judges and lawyers would determine whether or not two versions of a jury instruction are equivalent representations of the same law. This is the procedure commonly employed by the State court systems in revising pattern jury instructions. Special panels and committees are appointed to re-word existing instructions, and the revisions are examined by other judges for equivalency before they are adopted for trial usage.

Another procedure for determining the equivalency of two versions of the same instruction would be to ascertain that both instructions produce identical outcomes from identical fact situations, i.e.: that verdicts rendered by a jury for a given fact situation would be the same under either instruction, presuming of course, that the requirements of both versions would be equally well-understood by the jurors.

The language of jury instructions is marked by both variety and uniformity from state to state. Many terms and phrases, representing principles of law passed down through the centuries, have become so familiar that they appear even in lay language outside the legal context. Some of these terms and phrases represent carefully defined concepts and principles, while others signify concepts and principles of law about which the best-trained experts cannot agree. One such concept, crucial to jury decisionmaking in every criminal trial, is the concept of reasonable doubt.

The concept of reasonable doubt is used in every jurisdiction in the United States to establish the burden of proof required to convict a criminal defendant. A typical jury instruction to this effect is that of the state of New Mexico:

> The law presumes the defendant to be innocent unless and until you are satisfied beyond a reasonable doubt of his guilt.
>
> The burden is always on the State to prove guilt beyond a reasonable doubt. It is not required that the state prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based on reason and common sense -- the kind of doubt that would make a reasonable person hesitate to act in the graver and more important affairs of life (4).

It is presumed that this concept, reasonable doubt, sets a more stringent criterion for proof than that required to find for the plaintiff in a civil action. In civil proceedings, all that is required is a preponderance (greater weight) of the evidence. There is some evidence suggesting that while judges may understand that these two phrases signify substantially different burdens of proof, jurors may not be aware of the intended difference (7).

The notion that more stringent proof be required in criminal than civil cases has endured for at least fifteen hundred years. The translation of this notion into the words "beyond a reasonable doubt" has been traced back at least as far as a Dublin, Ireland courtroom in 1798, where the phrase first appeared in a case of high treason (1,p.798).

Legal scholars have written extensively on the concept of reasonable doubt, attempting to elaborate and clarify its meaning and render it a more objective decision criterion. At best, reasonable doubt can be objectified only in terms of subjective probability estimates.

Simon and Mahan (7) investigated the difference among judges', jurors', and students' interpretations of the reasonable doubt criterion and the preponderance criterion as probability estimates. They found that more than half of the subjects in each group translated "beyond a reasonable doubt" into a probability of 0.86 or higher, with jurors being slightly less stringent than judges and students with respect to their requirements for proof. They also found that jurors and students translate "by a preponderance of the evidence" into a probability around 0.75, while judges interpret this criterion much less stringently, or around 0.55. Thus, the judges make a much clearer distinction between criminal and civil decision criteria.

One of Simon and Mahan's unanticipated findings was that asking subjects to translate their beliefs about fact situation into a probability estimate results in a pro-defendant bias, i.e.: decreases the likelihood of guilty verdicts.

Sealy and Cornish (6) manipulated definitions of the reasonable doubt criterion in jury instructions given to mock criminal juries, and concluded that such manipulations produce weak effects, occasionally in directions contrary to expectations; more stringent definitions produce higher rates of convictions. Kerr et al (3) argue that Sealy and Cornish's conclusions failed to take into account the differential effects of initial jury dissensus, a condition under which Sealy and Cornish's data suggest that the effects of definitional variation are more marked. Kerr and his colleagues manipulated the stringency of instructional definitions of reasonable doubt together with the jury's assigned decision rule (consensus vs majority required: to convict) in a 3 X 2 factorial experiment. They concluded that mock juror's verdicts are sensitive to definitional variations of reasonable doubt, especially where initial dissensus is high. They also inferred that these manipulations do not affect jurors' perceptions of the weight of the evidence against the defendant, but rather their perceptions of the weight of evidence required, or burden-of-proof.[1]

[1]This inference is based on the observations that jurors' ratings of the "probability that the defendant committed the crime" did not vary under various treatment conditions, while the verdicts rendered did. It could be argued that these two dependent measures measure the same thing, or should, and that the results thus obtained are artifactual in nature. Kerr's conclusion may be premature; it seems likely that decision criteria such as reasonable doubt do not exist as relatively stable, fixed, and enduring criteria, independent of the context in which they are exercised. Rather, the weight of evidence adduced against a particular defendant may serve as a frame of reference in which reasonable doubt is evaluated. This is analogous to the situation in the marketplace where a buyer asks a merchant, "How much do you want for that thing?", and the merchant replies, "How much have you got?" For an engaging discussion of such contextual influences, see Parducci, Allen. "The Relativism of Absolute Judgments" (5).

It may be fallacious to assume that the term "reasonable doubt" has a referent. Attempts by lawyers and judges to define the term, and by social scientists to manipulate these definitions as independent variables, may be nothing more than exercises in reification.

Establishing a burden of proof is, in effect, demanding of a particular jury a certain level of resistance to persuasion. Feinberg (2) has drawn the analogy between a juror and a social science experimenter using inferential statistics in hypothesis-testing. Type I error is analogous to convicting an innocent person, Type II to failing to convict a guilty one. Both the scientist and the juror must balance the risks of both types of error in terms of the potential consequences each. The scientist's decision is made easier by the availability of objective techniques for gauging relative risks, such as statistical power tests. The juror has only his "reason and common sense."

To date, attempts by both legal scholars and social scientists to clarify and standardize the criminal burden of proof have treated "reasonable doubt" as the sine qua non of the spirit of the law. Rather than "defining" reasonable doubt, would it not make sense to determine empirically how manipulations of the language of jury instructions actually affect subjective probability estimates of guilt and verdicts based thereon. Equipped with knowledge of how actual jurors decide cases on the basis of various jury instructions, legal scholars and lawmakers could standardize outcomes by selecting the language that best establishes the desired burden of proof.

Consider for a moment the characteristics of an ideal jury trial. In the idealized situation, jurors beliefs about the defendant are uncontaminated by pre-trial publicity or by previous acquaintance with the defendant. At the outset, jurors are equipped with only one possible reason for believing the defendant guilty of wrongdoing -- the fact that the state probably wouldn't prosecute without cause. The jurors can safely assume that a grand jury or district attorney has found prima facie evidence that the defendant committed the crime with which he has been charged.

The rules of the trial are simple. The state must prove its case against the defendant. The defendant is not obligated to prove his innocence. In theory, neither the defendant nor his counsel is required to utter one word in his defense. The state attempts to prove its case by advancing reasons for believing in the defendant's guilt. The case is argued in affirmative terms, addressing the issues of law established by the elements of the crime in question. The jury must confine itself to <u>issues of fact</u>. The final verdict depends upon the extent to which the prosecutor has gained adherence to a set of propositions of fact. The jurors, individually at first and then collectively, judge the adequacy and sufficiency of the reasons advanced for believing in the defendant's guilt.

Reasonable doubt consists only of an insufficiency of reasons for believing in guilt. Put another way, reasonable doubt exists where there has been an <u>insufficient reduction of uncertainty.</u>

It might be a more accurate reflection of what actually happens in court to state the burden of proof/presumption of innocence doctrine in affirmative terms, emphasizing a focus on the reasons (evidence) advanced. One way to do so would be to state that in order to convict, it is necessary to become convinced of the defendant's guilt to a reasonable degree of certainty, based on the reasons advanced.

On its face, there appears to be no logical difference between these alternative instructions. Reasonable doubt is the logical reciprocal of reasonable degree of certainty. In fact, there are some states where reasonable doubt is defined in terms of "moral certainty." A "moral certainty" is a degree of certainty about some fact situation sufficient to form a basis of action where the consequences have great moral significance, as in "the graver and more important affairs of life (4)."

Stating the doctrine in terms of reasonable certainty may have several advantages. It more accurately reflects what happens in the courtroom, i.e.: reasons are advanced, rather than doubt removed; it may shift attention toward the sufficiency of reasons for believing, and away from reasons for disbelieving, thus encouraging more careful examination of the quality of affirmative evidence presented.

For the past several years, the writer has been privileged to serve on the faculty of the National Judicial College. Reasonable doubt has been a frequent topic of discussion in training sessions dealing with the composition and delivery of

jury instructions. These discussions have revealed that, while the majority of judges seem to sense the inadequacy of the typical reasonable doubt instruction, they are reluctant to part with these standard terms. The following question was put to several hundred judges: Are these two phrases logically equivalent: "beyond a reasonable doubt," and "to a reasonable degree of certainty?" All but two or three said they were. They were then asked which phrase would be preferable for jury instructions, and all but one favored the standard "reasonable doubt" wording, predicting that "to a reasonable degree of certainty" would reduce prosecution's burden of proof, making it easier to convict a defendant.

Method. An experiment was conducted to test the judges' hypothesis. A pilot study was conducted to find the extent to which a fictitious case summarizing evidence presented in a criminal trial would produce dissensus in individual verdicts rendered by mock jurors without deliberation. The case summary was adapted from a fact situation used as a basis for mock trials at the National Judicial College.

Subjects were asked to read carefully the case summary, which involves a male defendant charged with the sale of heroin. Experimental treatments consisted of four different versions of jury instructions appearing in the case booklets immediately after the evidence summaries. The four different instructions were:

1. Reasonable Doubt:

The law presumes the defendant to be innocent unless and until you are satisfied beyond a reasonable doubt of his guilt.

The burden is always on the State to prove guilt beyond a reasonable doubt. It is not required that the State prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based on reason and common sense -- the kind of doubt that would make a reasonable person hesitate to act in the graver and more important affairs of life.

2. Reasonable Certainty:

The law presumes the defendant to be innocent unless and until you are satisfied to a reasonable degree of certainty of his guilt.

The burden is always on the State to prove guilt to a reasonable degree of certainty. It is not required that the State prove guilt to an absolute degree of certainty. A reasonable certainty is a degree of certainty based on reason and common sense -- the kind of certainty that would make a reasonable person act in the graver and more important affairs of life.

3. Composite (Doubt and Certainty):

The law presumes the defendant to be innocent unless and until you are satisfied to a reasonable degree of certainty, beyond a reasonable doubt, of his guilt.

The burden is always on the State to prove guilt to a reasonable degree of certainty, beyond a reasonable doubt. It is not required that the State prove guilt to an absolute certainty beyond all possible doubt. The test is one of reasonable certainty and reasonable doubt. A reasonable degree of certainty, or similarly, a reasonable doubt, is based on reason and common sense -- the kind of certainty or doubt that would make a reasonable person act, or hesitate to act, in the graver and more important affairs of life.

4. No Instruction: (No statement on burden-of-proof included)

These instructions appeared in the middle of a set of instructions detailing elements of the offense, the jury's role as trier of fact, and so on.

Subjects were students enrolled in basic communication courses at the University of Nevada during the summer of 1977. Fifty-six subjects (23 males, 33 females) were randomly assigned to treatment groups. After reading the case summaries and jury instructions, subjects completed a two-item questionnaire asking for (1) an estimate of the strength of the subject's belief in the defendants guilt on an 11-point scale anchored at the poles by 0 - "Absolutely certain not guilty, and 100 - "Absolutely certain guilty," and (2) a Yes/No answer to the question, "In your opinion, is the degree of strength of your belief sufficient to convict the defendant of the crime as charged?"

Data from the pilot study are summarized in Tables 1 and 5. The data clearly show that the case summary produced sufficient initial (predeliberation) dissensus to warrant using it in a second study involving deliberation. In spite of the obvious differences in treatment means and conviction percentages, a one-way ANOVA on the belief-in-guilt data failed to yield a significant F ratio because the case had served as intended, producing large within-group variances.

Subjects in the main study were 88 students (49 females, 39 males) enrolled in elementary communication classes at the University of Nevada. The procedure in the main study was the same as that employed in the pilot, with the following exceptions:

After reading the case summaries and jury instructions, subjects convened in six-person juries to deliberate the case. Each jury was composed of individuals exposed to similar experimental treatments, i. e.: identical versions of the jury instructions. The mock juries were instructed to deliberate until a consensus verdict was reached. After thirty minutes of deliberation, those juries unable to reach consensus were given an additional ten minutes, after which they were declared "hung" if still unable to reach consensus. The same two criterion measures used in the pilot study were given to each juror after deliberation. Subjects were instructed to complete the belief-in-guilt scale without consultation or disclosure to fellow jurors, and to let the acquittal/conviction question reflect their final vote during deliberation.

Table 1: Pilot Study Data Summary

	Treatment Conditions			
	Reasonable Doubt	Reasonable Certainty	Composite	No Instruction
Belief-In-Guilt Mean	6.0	4.57	6.25	5.71
Standard Dev.	3.1	2.9	2.7	2.6
Percentage of Convictions	57%	29%	50%	29%
Acquittal Ranges	0 - 6	0 - 6	1 - 7	0 - 8
Conviction Ranges	5 - 10	7 - 9	7 - 9	6 - 9

Results The pilot study showed that the case produced high initial disagreement, as intended. It also produced a puzzling pattern of belief-in-guilt means and conviction rates; the standard "reasonable doubt" instruction and the composite ("doubt" and "certainty") instruction produced nearly identical outcomes, while the reasonable certainty instruction produced both belief-in-guilt ratings and a conviction rate lower than either of the above. Moreover, the no-instruction condition produced the same conviction rate as the certainty condition, and the next-to-lowest mean rating for belief-in-guilt.

Table 2: Main Study (With deliberation) Data Summary

	Treatment Conditions			
	Reasonable Doubt	Reasonable Certainty	Composite	No Instruction
Belief-In-Guilt Mean	7.61	4.52	7.00	7.83
Standard Dev.	2.19	2.50	2.02	1.57
Percentage of Convictions	82%	0%	59%	86%
Acquittal Ranges	4 - 8	0 - 9	2 - 7	6 - 7
Conviction Ranges	1 - 10	--	7 - 10	5 - 10

The main study produced results similar to the pilot with respect to the doubt, certainty, and composite treatment conditions, but differed radically with respect to the outcomes of the no instruction condition. The no-instruction condition produced the highest mean rating of belief-in-guilt and the highest conviction rate.

Table 3: Analysis of Variance Summary
Belief-In-Guilt Means

Source of Variation	SS	df	MS	F	p
Treatment	152.66	3	50.89	11.57	<.001
Error	369.57	84	4.40		
Total	522.23	87			

A one-way ANOVA of the main study data (see Table 3) yielded an F of 11.57, $p<.001$. Pairwise comparison of treatment means using Scheffe's Method (see Table 4) showed that the reasonable certainty instruction was significantly different ($p<.05$) from each of the other instructions, but that the other instructions (doubt, composite, and no instruction) were not significantly different from one another.

A comparison of the belief-in-guilt ranges for conviction and acquittal for both the pilot and the main study is shown in Tables I and 2 . In the pilot, there is a cleaner break, I.E.: the ranges for acquittal and conviction overlap minimally. In the main study, the overlap is much greater.

Table 4: Pairwise Comparisons of Treatment Means

Pairs	Differences	P
Doubt vs. Neither	0.22	NS
Doubt vs. Composite	0.61	NS
Doubt vs. Certainty	3.09	$<.05$
Certainty vs. No Instruction	3.30	$<.05$
Certainty vs. Composite	2.47	$<.05$
Both vs. No Instruction	0.83	NS

Critical difference = 1.79 by Scheffé's Method

Table 5: Probability of Guilt - Pilot Study

Belief-In-Guilt	Doubt		Certainty		Composite		No Instruction	
	Freq.	Cum. Freq.	Freq.	Cum. Freq.	Freq.	Cum. Freq.	Freq.	Cum. Freq.
10	1	100%						
9	3	93%	2	100%	3	100%	2	100%
8	2	71%			3	79%	3	86%
7	1	57%	2	86%	2	57%		
6	1	50%	1	79%	2	43%	2	65%
5	1	43%	2	65%	1	29%	3	50%
4	2	36%	2	50%			2	29%
3	1	21%	2	36%	1	21%	1	14%
2	1	14%	1	21%	1	14%		
1					1	7%		
0	1	7%	2	14%			1	7%

Table 6: Probability of Guilt - Main Study

Belief-In-Guilt	Doubt		Certainty		Composite		No Instruction	
	Freq.	Cum. Freq.	Freq.	Cum. Freq.	Freq.	Cum. Freq.	Freq.	Cum. Freq.
10	2	100%			2	100%	4	100%
9	7	91%	1	100%	2	91%	5	82%
8	7	59%	3	95%	8	82%	4	59%
7	1	27%			2	45%	3	41%
6	1	23%	5	82%	4	36%	5	27%
5	2	18%	1	59%	2	18%	1	5%
4	1	9%	4	55%				
3			4	36%	1	9%		
2			2	18%	1	5%		
1	1	5%						
0			2	9%				

Discussion. The most salient feature of these results is that they are contrary to the expectations of the trial judges polled at the National Judicial College; the judges predicted that instructing the jury in terms of reasonable certainty would produce more convictions by diminishing standards for proof. Not only was the prediction disconfirmed, but exactly the reverse occurred. This finding, taken together with Simon and Mahan's (7) finding that judges and mock jurors do not share similar perceptions of the intended distinction between criminal and civil burdens of proof, raise serious questions about the validity of present methods of jury instruction revision.

Judges and lawyers tend to share a semantic-referential theory of language and meaning, believing that the meanings of complex legal concepts can be shared through a common language code. They assume, in short, that "reasonable doubt" has an experiential referent for jurors -- a fairly stable standard of judgment, relatively independent of the context in which judgments are called for. Given these assumptions, the problem of charging a jury is viewed as a problem of usage based on selecting the symbols and syntax that seem to agreeably correspond with appropriate referents. A pragmatic conception of meaning is unfamiliar to most judges; judges, especially those who experienced limited success as trial advocates, tend to place more confidence in how jurors should respond to messages than

to how they actually do respond.

All professional and technical persons become enamored of their jargon. Judges find it difficult to accept the possibility that a familiar technical term, in use for nearly two hundred years, might not be functioning as intended. But language is not static. Terms and phrases do not retain their "meanings" unchanged over long periods of time. "Beyond a reasonable doubt" may have undergone change to the same extent that a contemporaneous legal phrase has done -- "cruel and unusual punishment."

A comparison of the treatment means and conviction rates produced in the pilot study versus the main study shows similarity for the doubt, certainty, and composite conditions, but a radical difference for the no-instruction condition; pilot subjects were reluctant to convict without instruction. A possible explanation for this is that subjects in the pilot study were exceptionally conservative in setting their own standards of proof, having had no source of external guidance in the form of either instructions from the judge or the opportunity to deliberate with fellow jurors. The presumption-of-innocence doctrine suggests that it is worse to convict an innocent person than to acquit a guilty one. Thus, in the absence of any source of external guidance on the burden-of-proof, individuals may set more rigorous standards than would be set by the same individuals

after deliberation. This may be an instance of the familiar "risky shift" phenomenon, if it can be assumed that conviction of an innocent party is inherently more risky than acquittal of a guilty one.

The most puzzling result was the composite instruction's failure to produce outcomes significantly different from the doubt instruction, a pattern which held for both the pilot and the main study. This suggests that the very mention of reasonable doubt relaxes the juror's estimate of proof required. This is apparently an overassimilation effect, where the reasonable doubt phrase is the overwhelming determinant of the meaning assigned to the entire instruction.

Why would such an overassimilation effect occur, rather than a movement toward equilibrium or congruity somewhere between the separate outcomes for the doubt and certainty instructions? A possible explanation here is that a typical juror wants to be given reasons sufficient to convict a criminal defendant, and is looking for permission to set a standard of proof that will allow conviction even in the absence of an airtight case for the state. This is not to say that the juror does not demand a fair trial in terms of state's burden of proof; rather, the typical juror has a strong desire to hear a convincing case "for the people" culminating in the conviction of a criminal offender. Thus, the juror may interpret "to a reasonable degree of certainty, beyond a reasonable doubt," disjunctively, rather

than redundantly, and perceive as more salient the phrase that sets the less stringent burden of proof.

One explanation for the unexpected increase in the burden of proof under the certainty instruction is that the term certainty suggests an absolute judgment, even when qualified in the phrase ". . . to a reasonable degree of certainty," while doubt is something we all understand to exist in degrees. Metaphorically, both instructions suggest geometric reference scales -- linear "distances" traversed by the quality and quantity of evidence presented in the trial.

An intuitively more plausible explanation is that mock jurors do not recognize the logical equivalence between the two instructions, believing that there is indeed a difference between having some degree of doubt as to the truth of a proposition of fact, and having some degree of uncertainty about it. Jurors may recognize that both instructions suggest differences in degree and not merely in kind, but fail to recognize that the differences called for lie along the same judgmental dimension.

Jurors know very little about the nature of their own judgments. Their "reason and common sense" may equip them to decide matters of life and death, freedom and bondage, but it does not necessarily equip them with an understanding of the process of persuasion in which their judgment is rendered. To say that a person is reasonable is not to

say that he or she understands the nature of the reasoning process, nor is it to say that he or she needs no help in setting a burden of proof suitable for decisionmaking in the trial context.

To return to Feinberg's analogy between the social scientists and the juror (2), instructing a jury on the burden of proof is analagous to training a group of coders to make reliable judgments in a social science experiment. Coders are given criteria for making discriminal judgments, and then exercised until their judgments produce high intercoder correlations. Should we expect any less of a group of persons deciding the fate of a criminal defendant?

As with every study involving mock juries, the external validity of these results is questionable. Additional investigations under conditions as similar as possible to actual trial conditions will be necessary before the differences found here can be generally confirmed. Even then, it remains to determine exactly what the criminal burden of proof should be. Defense lawyers would probably lobby for instructions on reasonable certainty, while prosecutors would advocate the traditional reasonable doubt terminology, or perhaps something even less rigorous. If the standards of proof "in the juror's mind" are as susceptible to manipulation in the actual courtroom as they appear to be in the laboratory, then the "reason and common sense" taken for granted, is as free to vary as is the quantity and quality of evidence presented in the trial. This being

the case, some specialized instruction in rational decision-making for jurors might be indicated, both for the sake of justice and for the sake of deliberative efficiency. Perhaps too much is taken for granted, and we expect too much of the juror.

In addition to further inquiry into jury instructions on burdens of proof in both criminal and civil forums, several other troublesome and crucial jury instructions warrant investigation from a pragmatic standpoint. These include instructions on credibility of witnesses, statements made by the accused, the meaning of a plea of not guilty, and the equal importance of every instruction given to the jury.

The presumption of innocence doctrine is much like the First Amendment -- something we demand for ouselves and are thus willing to grant to others, but only reluctantly in a context of war, crime, or violence. A jury must be persuaded to set a reasonable standard of proof or they may fail to do so. The persuasive message must be based on pragmatic considerations, and not merely on the preconceptions of experts on what sort of message <u>should</u> work.

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